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IS THE CONSTRUCTION OF WILLS DEVISING  
REAL ESTATE GOVERNED BY THE RULES  
OF CONSTRUCTION OF THE DOMICIL OF  
THE TESTATOR OR BY THE RULES OF THE  
SITUS OF THE PROPERTY?

There is a deep-rooted and widespread opinion among legal practitioners that the construction of a will of real estate is determined according to the rule of the *situs* and not according to the law of the domicil.

Having entertained for some time this opinion in common with others of the profession I was compelled a few months ago to examine the authorities on the question closely and I found that the contrary of this opinion was expressed by two text writers on the Conflict of Laws—one the most recent writer on that subject and the other probably the most venerated in the United States. On turning to the most recent work on the Conflict of Laws,<sup>1</sup> I found the following discussion of the subject:

<sup>1</sup> Conflict of Laws; or Private International Law, by Raleigh C. Minor, M. A., B. L., Professor of Law in the University of Virginia. Boston: Little, Brown & Co., 1901. Page 341.

"If the property disposed of be *land* situated in a state other than the testator's domicile, some question has been made whether the *interpretation* of the testator's language should be controlled by *the law and usage* of the domicile or of the situs of the property. A few cases may be found holding that the interpretation of the devise must depend upon the *lex situs*. But here too the weight of reason and authority is in favor of the rule that the interpretation of a devise is to be governed by the law of usage with which the testator is supposed to be most familiar, namely, that of his domicile; and hence when he uses words he must be presumed to have intended that they should be used in the sense given them in his domicile, unless the contrary appears."<sup>2</sup>

On turning to Story on the Conflict of Laws<sup>3</sup> with that confidence which his name generally inspires, I found the following discussion of the law governing the construction of "Wills of Immovables:"

"The same rules of construction (i. e., the same that apply to wills and testaments of personal property)<sup>4</sup> will generally apply to wills and testaments of immovable property, unless indeed it can be clearly gathered from the terms used in the will, that the testator had in view the law of the place of the situs, or used other language, which necessarily referred to the usages and customs, or language appropriate only to that *situs*."<sup>5</sup>

Now in the particular case under my consideration, the testator made his will in Maryland and had used no language from which it could possibly be inferred that he "had in view the law of the place of the situs (Pennsylvania) or used other language, which necessarily referred to the usages and customs or language appropriate only to that situs."

Mr. Bigelow, the latest annotator of Story, has printed in

<sup>2</sup> Citing *Ford v. Ford*, 80 Mich. 42, 1890; *Ford v. Ford*, 70 Wis. 19, 1887; s. c. 72 Wis. 621, 1888; *Proctor v. Clark*, 154 Mass. 45, 1891; *Lincoln v. Perry*, 149 Mass. 368, 1889.

<sup>3</sup> Story's Conflict of Laws, 8th ed., p. 671.

<sup>4</sup> See same volume, p. 663.

<sup>5</sup> Citing *Trotter v. Trotter*, 4 Bligh. N. S. 502, 1828.

the Eighth Edition<sup>6</sup> a note to the same effect as Story's text, citing both modern and early cases. Mr. Bigelow in his preface to this edition gives Mr. J. L. Thorndike, of the Boston Bar, the credit for writing this note, of which the following portion should be quoted here:

"The rule that a will is to be interpreted according to the law of the testator's domicile, is not limited to dispositions of his personal estate but seems to apply in all cases, except where it appears that he expressed his meaning with reference to the law of some other place.<sup>7</sup> For example, in cases where a will is inoperative as to real estate in a foreign country, and the question is whether the testator has expressed an intention to dispose of it which will put the heir to his election, the interpretation is governed, not by the law of the foreign country where the real estate is, but by the law of the testator's domicile."<sup>8</sup>

Mr. Thorndike concedes that "a disposition of property in the technical forms of a foreign law will in some cases show an intention that it is to be construed according to that law."<sup>9</sup> But this, says Mr. Thorndike, is not so unless the devise is in the technical form of a foreign law. He says:

"Perhaps a specific disposition of real estate in a foreign country separately from other property may be presumed to have been made with reference to the law of that country, and may therefore be interpreted according to that law.<sup>10</sup> But no such presumption can arise where a testator makes a general disposition of all his property or all his real estate. In such a case the question being simply one of the intention expressed in the will, and not of the validity of the disposition it is evident that the words express the same

<sup>6</sup> Pages 650-651.

<sup>7</sup> Citing *Trotter v. Trotter*, 4 Bligh. N. S. 502, 1828; *Wallis v. Brightwell*, 2 P. W. 88, 1722; *Maxwell v. Maxwell*, L. R. 4 H. L. 506, 1870; *Caulfield v. Sullivan*, 85 N. Y. 153, 1881.

<sup>8</sup> Citing *Trotter v. Trotter*, 4 Bligh. N. S. 502 1828; *Maxwell v. Maxwell*, 2 D. M. & G. 705, 1852; *Orrell v. Orrell*, L. R. 6 Ch. 302, 1871.

<sup>9</sup> Citing *Chamberlain v. Napier*, 15 Ch. D. 614, 1880; *Mitchell v. Davies*, Scotch Ct. Sess. Cas. Fourth Series, vol. iii, p. 208, 1875.

<sup>10</sup> Citing *Yates v. Thompson*, 3 Cl. & F. at p. 588, 1835.

intention as to all the property or real estate wherever it may be. They ought not therefore to be interpreted even in the case of real estate so as to have different meanings in the different countries where the lands may be.<sup>11</sup> This has sometimes been done, however, but, as it is submitted, by a misapplication of the rule that the *validity* and *forms* of transfers of real estate are governed by the *lex situs*.<sup>12</sup> When the question is whether a general gift shows an intention to dispose of property over which the testator has a power of appointment, and which is subject to the law of a foreign country, it cannot be said that the gift should be interpreted according to the foreign law because it takes effect under that law, for the object of the interpretation is to ascertain whether it takes effect or not. It cannot be said that it should be interpreted according to the law of any place where there may be property which the testator has power to dispose of, for then the same words would in Massachusetts show that he intended to exercise all his powers of appointment, and in Maryland would not show that he intended to exercise any. Resort must be had in such cases to the law of the place in the language of which the testator would probably have expressed his meaning. The authorities seem to establish that that law is the law of the country in which he was domiciled. It is submitted, therefore, with deference, that in each of these two cases<sup>13</sup> the will should have been interpreted according to the domicile of the testator who made the will in question, and not of the testator who made the will containing the power. If this had been done, the will in Bingham's Appeal, would have disclosed an intention to dispose of all property which the testator had a general power to appoint by will, and would have been effectual as an execution of the power. No intention to execute any power of appointment would

<sup>11</sup> Citing *Crusoe v. Butler*, 36 Miss. 150, 1858; *Wilson v. Cox*, 49 Miss. 538, 1873, 545; *Studd v. Studd*, Scotch Ct. Sess. Cas. Fourth Series, vol. viii, p. 249, 1880.

<sup>12</sup> Citing *Applegate v. Smith*, 31 Mo. 166, 1860; *Jennings v. Jennings*, 21 Ohio St. 56, 1871.

<sup>13</sup> Citing Bingham's Appeal, 64 Pa. St. 345, 1870; *Sewall v. Wilmer*, 132 Mass. 131, 1882.

have been found in the will in *Sewall v. Wilmer*, and accordingly the will would have had no effect as an execution of the power."

Finding therefore that the opinion of two text writers was opposed to the opinion which I found lawyers generally entertained on this question, I naturally turned to the authorities on which these text writers based their views and examined with interest the reasons and authorities relied on by them. Other text writers I found had reached an opposite conclusion to that of Story and Minor.<sup>14</sup> In view of this conflict of text writers an examination and analysis of the decisions in England and America became necessary.

The object of this paper is to give the result of this examination and to state what I believe to be the rule derived from reason and authority.

#### CLASSIFICATION OF CASES.

The question of course has arisen from time to time (1) in courts of the domicile, (2) in courts of the *situs*, (3) in the courts of a third sovereignty.

A classification of the cases on this basis will I think aid the discussion hereafter. With this classification in mind we naturally inquire:

1. Have courts of the domicile enforced their own law or that of the *situs* in construing wills of foreign realty?
2. Have courts of the *situs* enforced their own law or that of the foreign domicile of the testator in construing foreign wills devising realty within their jurisdiction?
3. Have the courts of a third sovereignty enforced the law of the domicile or the law of the *situs*?

#### I. WILLS OF FOREIGN REALTY CONSTRUED BY THE COURT OF THE DOMICIL.

The case of *Trotter v. Trotter*,<sup>15</sup> is undoubtedly the foundation of Story's opinion that the *lex domicilii* governs, be-

<sup>14</sup> Dicey on the Conflict of Laws, p. 528; Wharton on the Conflict of Laws, sec. 597; Redfield on Wills, vol. i, p. 398 and p. 409; Jarman on Wills, 6th ed., vol. i, p. 1.

<sup>15</sup> 4 Bligh. N. S. 502, 1828.

cause it is cited by Story as the authority for his proposition.<sup>16</sup> There is no doubt that the opinion of Lord Lyndhurst, Lord Chancellor, abounds with *dicta* in support of Story's view, but a careful consideration of the case shows that it is not an authority for his statement.

The testator domiciled in India devised to his executors in Scotland the residue of his estate in India, who "were thereby instructed to divide the remainder of his estate as they received it from India and the whole of his property in Europe into six equal shares to be paid share and share alike, to each of his brothers and sisters." Previously, the testator had remitted money to Scotland which under his direction had been invested in Scotch heritable bonds, which under Scotch law were real estate and passed to the heir at law of the creditor and not to his personal representative.

The oldest brother of the testator claimed the bonds as heir at law and also claimed one-sixth of the personal estate under the will. By the law of Scotland the bonds could not pass by the will even if such had been the expressed intention of Charles Trotter because the will lacked the technical words necessary to devise real estate. The question then was whether the heir at law could take his share of the personalty and also inherit the bonds (i. e., the real estate) or whether the intention of the testator to devise the real estate, though ineffectually declared, put the heir at law to his election. "A case was stated for the opinion of English counsel upon the question whether Trotter (the heir at law) was bound to elect." On their report the Scottish Court of Session held that the heir was not put to an election under the will.

It was assumed by the Court and the counsel, *but without the slightest consideration of the question*, that the *lex domicilii* was the proper rule of construction, both as to the personalty and as to the real estate devised by the will.

But the point on which the decision actually turned was that *there was no satisfactory evidence "that it was the intention of the testator to dispose by his will of the heritable bonds."*

In other words the Court proceeds to give judgment for

<sup>16</sup> Story's Conflict of Laws, 8th ed., p. 672.

the heir at law as to the bonds, *not* on the ground that the bonds are real estate and that by the law of England, if not of Scotland, he is not put to an election, but on the ground that the will does not devise any real estate at all. "The question," says the Lord Chancellor,<sup>17</sup> "was therefore simply a question of construction. Does it appear upon the face of the will that it was the intention of the testator to dispose of his real estate, that is, of those heritable bonds? Now the rule of law in England with respect to subjects of this kind is well ascertained and well defined and it is this, that you are not to proceed by probability or by conjecture but that there must be a clear and manifest expression of the intention on the face of the will, to include that property which is not properly devised, before the heir can be put to his election."

In determining this "question of construction" as to whether the will covered the heritable bonds, the House of Lords does not appear to have had recourse to the law of England or the law of Scotland but to the mere language of the testator.

All that *Trotter v. Trotter* decides is, therefore, that Charles Trotter did not express any intention to devise his Scottish heritable bonds. There was no conflict of laws. It is not suggested that by the law of Scotland the heir was put to election in cases where facts existed similar to those in *Trotter v. Trotter*.

Professor Minor has also cited *Trotter v. Trotter*,<sup>17a</sup> but it is easy to show that he has totally misunderstood that case. He says:<sup>17b</sup> "The Scotch law required an heir claiming also personal property under the will either to throw his heritage into the common fund and take his legacy or to elect between the two." . . . "It was held that the terms of the will must be construed according to the laws of England and that by the law of England the terms used were not such as to import an intention to transfer any real estate of the testator; that the law of England did not require a

<sup>17</sup> Page 507.

<sup>17 a</sup> P. 343.

<sup>17 b</sup> P. 343.



legatee who was also heir to throw his inherited lands into hotch-pot or else to elect."

The error consists in the statement that there was no doctrine of election under the law of England. But in the portion of the opinion just above quoted it appears that the English law did recognize the doctrine of election: "There must," said Lord Lyndhurst, "be a clear and manifest expression of the intention on the face of the will to include that property which is not properly devised, before the heir can be put to his election." There is not the slightest reason for the assertion that the law of England was in any respect different from the law of Scotland as to any matter at issue in *Trotter v. Trotter*.

To the supposed authority of *Trotter v. Trotter*, Story's Annotator, Mr. Bigelow, has added some other citations. Of these *Enohin v. Wylie*<sup>18</sup> is utterly irrelevant, as the case relates solely to personal property—"funds in England." This blunder of Bigelow's has been followed by the American and English Encyclopedia of Law,<sup>19</sup> where *Enohin v. Wylie* is cited as relating to real estate. *Chamberlain v. Napier*<sup>20</sup> is next cited by Bigelow, but the case does not prove Story's contention. In that case a marriage contract, relating to English realty, made in Scotland, was construed according to the law of England. The Court said: "The adoption of an English form of trusts ordinarily found in English Settlements, and of powers according to the law of England are circumstances favorable to the view that the settlement should, as regards the husband's property, be construed as being an English Settlement."

The final citation of Bigelow to Story's text is *Bible Society v. Pendleton*,<sup>20a</sup> but in that case the testator conveyed away Pennsylvania land by deed in his lifetime, directing that the grantee should sell the land and hold the proceeds subject to the written order of the grantor, who subsequently devised the said proceeds by will. The Court held that the law of the testator's domicil and not the law of Pennsylvania

<sup>18</sup> 10 H. L. Cases 1, 1862.

<sup>19</sup> Vol. iii, p. 637.

<sup>20</sup> 15 Ch. Div. 614, 1880.

<sup>20a</sup> a 7 W. Va. 79, 1873.

determined the validity of the devise. The case has obviously no application here, as there was plainly an equitable conversion.

*Wallis v. Brightwell*<sup>21</sup> is cited by Mr. Thorndike (in the note to Story's Conflict of Laws which I have above referred to<sup>22</sup>) as authority for the view that the *lex domicilii* governs when there is a conflict of law. This case, however, though it is a decision of the English Court of Chancery rendered by Lord Macclesfield is no authority for either side in the question under discussion. The testator domiciled in England at the making of his will devised his lands in Ireland to a trustee "in trust out of the rents and profits to pay £80 *per annum* to his wife for life." The only question was whether the testator meant English or Irish pounds. The Court held that as the will was made in England and all the parties lived in England "it cannot be conceived, that the testator thought of sending his wife every year to Ireland to fetch her annuity," and that English pounds was meant. Here plainly there was no conflict of laws whatever, the only question was the meaning of the word *pounds*. If the Irish law of real estate had declared that the word "pounds" occurring in wills of Irish land always must be construed to mean *Irish pounds*, while the English law had declared that the word "pounds" in all wills construed in English courts must be taken to mean English pounds then there would have been a question in the Conflict of Laws.

*Maxwell v. Maxwell*<sup>23</sup> is also cited in Mr. Thorndike's note to Story,<sup>24</sup> but no question of the conflict of laws arose in this case. The only question was whether a debt which had been created by the testator by giving a heritable bond on his Scotch estate of Glenlee was to remain a charge on that estate in the hands of a son to whom he had previously devised that property by a Scotch testamentary instrument, or whether, under the terms of his English will made subsequent to the testamentary instrument, the English personal estate should be applied in exoneration of the debt

<sup>21</sup> 2 P. W. 88, 1722.

<sup>22</sup> See p. 625.

<sup>23</sup> L. R. 4 H. L. 506, 1870.

<sup>24</sup> See *ante* p. 625.

under a direction contained in the English will (which was made subsequent to the disposition of Glenlee) that the devises and provisions of his will should be construed so as not in any manner to affect his Glenlee estate. This will directed his trustees to pay out of the residuum "all my just debts and funeral and testamentary expenses." The heritable bond on Glenlee was given after the execution of the English will. The House of Lords held that the residuum must exonerate Glenlee.

Mr. Thorndike's note also cites as an authority the case of *Caulfield v. Sullivan*.<sup>25</sup> In that case a testator living in France but a citizen of New York devised all his real and personal estate to the plaintiff "on condition that she execute the disposition hereinafter contained." "The testator left real and personal property both in France and the United States." The disposition above referred to was a devise of all property "situated on the continent of America to my brothers." The plaintiff having accepted the provisions of the will in her favor by taking all the property in France was not permitted to assert a claim against the estate in this country. There is difficulty in finding any conflict of laws in this case, as the plaintiff, who appeared as a creditor of the estate, in America, was held to have been put to an election. If the case implies that under the French law the plaintiff's title to the French real estate did not depend on her relinquishing all claims against the estate in America, but that she might claim both under and against the will at the same time, the reply seems sufficient that the court of the domicil could impose what to it seemed an equitable condition as to the assertion of her claim here for a sum of money without in any way conflicting with the French law of real estate.

*Maxwell v. Maxwell*.<sup>26</sup> This case is also cited as an authority by Mr. Thorndike, in his note to Story, but it is not an authority in favor of the doctrine he maintains. The case was in Chancery. The testator domiciled in England owned three heritable bonds for sums charged upon lands in Scotland (which bonds were real estate by the law of

<sup>25</sup> 85 N. Y. 153, 1881.

<sup>26</sup> 2 De Gex McN. & G. 705, 1852.

Scotland and passed to the heir) also English estates and certain personal property. He devised and bequeathed "all my real and personal estate whatsoever and wheresoever and whether in possession or reversion upon trust," etc. The will did not in the words of devise contain the word "dispone" which is essential to a valid disposition of real estate in Scotland and also lacked the clause of attestation which was essential to a valid disposition of real estate in Scotland. The question was whether the defendant was compelled to *elect* to take either a share under the will in both the personal estate and the Scottish estate or the Scottish estate without the will, or whether on the other hand he was entitled to take the benefits under the will and also to take as the heir at law the Scotch estate in the heritable bonds. The Master of the Rolls, Sir John Romilly, decided that the heir was *not* put to an election. The Court of Chancery, Knight Bruce, L. J., and Cranworth, L. J., dismissed the appeal from that decision.

Bruce, J. L.: "The will is of unquestionable invalidity as to the real estate in Scotland, which, accordingly has descended on one of the testator's children as his heir according to the law of Scotland . . . if he has specially mentioned property not capable of being so given, the case is not the same; as here, if the testator had mentioned *Scotland* in terms, or had not had any other real estate than real estate in *Scotland* there might have been ground for putting the heir to his election. The matter, however, standing as it does, we are, as it seems to me, bound to hold that the will before us does not exhibit an intention to give or to affect any property that the will was not adapted to pass."

*Orrell v. Orrell*<sup>27</sup> is also cited in the note of Mr. Thorne-dike to Story. But the case is one where the heir at law of Scotch estates, which had been devised "upon trust to sell my *said* real estate," (i. e. in any part of Great Britain or elsewhere) was put to an election, the will being "inoperative to pass the Scotch estate."

Such a case, I submit, does not raise a conflict of laws at all as the court of the domicil does not pretend to hold that the will is operative, as to the real estate.

<sup>27</sup> L. R. 6 Chancery Appeals, 302, 1871.

The court of the domicile recognizes that the heir at law has a perfect title to the real estate under the foreign law, but refuses to allow him to assert that title against the will and at the same time claim under the will in the court of the domicile.

Thus in *Maxwell v. Maxwell*,<sup>28</sup> above cited, the court held that the heir at law was *not* put to an election, and in *Orrell v. Orrell* they held that he was put to an election. The ground of the decisions was that in one case the court construed the will to express such an intention as to the Scotch lands that the heir ought not to defeat that intention by claiming against the will and at the same time under it; in the other case the court held that no such intention was expressed as put the heir to an election.

These cases on election cannot be regarded as proper evidence to establish the contention of Story because the question of election in the court of the domicile is of necessity a question concerning the right to personal property under a will devising both personal property and foreign real estate.

The heir at law's title to the real estate under the foreign law may be perfect because of the informality of the devise. The court of the domicile does not attempt to say that the law of the *situs* is not binding as to the real estate in the court of the domicile so long as the heir at law is content to be merely the heir at law. But the court of the domicile without attempting to deny the application of that foreign *lex rei sitae* may say to the heir at law, you shall not come into this court as a *legatee* of personal property of the testator, or of funds arising from the sale of his real estate and thus claim under his will unless you surrender your rights as heir at law. It is submitted that the cases on election used by Mr. Thorndike to establish his theory are therefore not in point at all.

To create a conflict of laws in such a case it would be necessary to have a rule in the court of the *situs* as to the election of the heir at law exactly the opposite of the rule of the court of the domicile. The court of the domicile would

<sup>28</sup> 2 De Gex, McN. & G. 705, 1852.

then be compelled to enforce either their own rule as to the election of the heir at law of real estate or the rule of the situs. But in such an event it is difficult to see how the rule could be regarded as anything but a rule as to the construction and enforcement of wills of personal property.

In *Van Dyke's Appeal*,<sup>29</sup> a case not cited by Mr. Thordike or Mr. Bigelow, the true character of an enforced equitable election in relation to a foreign law is shown in an important decision in which the opinion was delivered by Sharswood, J.

A testator domiciled in Pennsylvania devised lands in New Jersey to his sons in equal shares, and gave his daughters pecuniary legacies.

The will, having no subscribing witnesses, was ineffectual to pass title to the sons in the New Jersey lands. They therefore filed a bill against the daughters. "The prayer is that the daughters may be put to their election, either to give effect to the whole will, by relinquishing their claim upon the New Jersey property or from their legacies to compensate the sons for their loss in consequence of the daughters sharing with them the New Jersey property."

The Court said: "The case before us is of a will duly executed according to the laws of Pennsylvania, devising lands in New Jersey where, however, it is invalid as to the realty by not having two subscribing witnesses. A court of New Jersey might hold themselves on these authorities bound to shut their eyes to the devise of the realty and consider it as though it were not written. . . . But a statute of New Jersey has no such moral power over the conscience of a court of Pennsylvania to prevent it from reading the whole will upon the construction of a bequest of personalty within its rightful jurisdiction. If a question could arise directly upon the title of the heirs at law to the New Jersey land, doubtless the court of any other state, upon the well settled principles of the comity of nations, must decide it according to the *lex rei sitae*. We are dealing only with the bequests of personalty, and the simple question is, *whether the testator intended to annex to them a condition.*"

<sup>29</sup> 60 Pa. St. 481, 1869.

The American and English Encyclopedia of Law<sup>30</sup> follows Story and says: "The law of the domicile of the testator governs in the construction of a will disposing of real property, unless the testator had in view the law of the *situs*, or uses language necessarily referring to the usages and customs, and appropriate only to that *situs*."

The citations include *Trotter v. Trotter* which we have already considered, and *Enohin v. Wylie*, the latter case not relating to real estate at all. The author of this article had evidently close at hand the Bigelow-Thorndike annotations to Story.

The case of *Dannelli v. Dannelli*,<sup>31</sup> cited by the American and English Encyclopedia has no application whatever to the question at issue for the opinion states that "in this case, the law of both the testator's domicile and *situs* regard A. as a legitimate child and heir"—which legitimacy was the question. Under the laws of Italy where the legatee lived, the legatee was not legitimate. This case is like the one above,<sup>32</sup> where the question was, in what sense did the testator use the word "pounds?" In *Dannelli v. Dannelli* the Court held that by the word heir in a Kentucky will was meant heir according to the Kentucky law.

The case of *Lincoln v. Perry*,<sup>33</sup> is also cited by Mr. Minor to sustain his theory, but the case decides nothing whatever to support his contention.

Plaintiff was a trustee of New Hampshire lands, which had been sold under order of Court in that state. The Massachusetts Court refused to give directions as to anything but personalty on a bill for direction.

The Court said:

"These questions so far as we are called upon to deal with them relate only to the disposition which the trustee is to make of the personal estate given by the residuary devise. There was no real estate in Massa-

<sup>30</sup> 1st edition, vol. iii, p. 367. Citing *Dannelli v. Dannelli*, 4 Bush. 62 Ky. 1868; *Enohin v. Wylie*, 10 H. L. Cas. 1, 1862; *Trotter v. Trotter*, 3 Wils. & Sh. 407; s. c. 4 Bligh, N. S. 502, 505, 1828.

<sup>31</sup> 4 Bush. 62, Ky. 1868.

<sup>32</sup> *Wallis v. Brightwell*, 2 Peere Williams, 88, 1722.

<sup>33</sup> 149 Mass. 368, 1889.

chusetts which was included in the residuary devise. The plaintiff, having been appointed trustee in New Hampshire for the purpose of selling the land there situated, and having made sale of it accordingly, will account for his disposition of the proceeds of such sale in the courts of that state.

The Court then said that the expression "heirs at law" to whom the testator devised the residue of his estate was to be determined by the law of his domicile, but the Court here disposed of nothing but the testator's personal estate.

In *Ford v. Ford*,<sup>34</sup> a bill was brought to construe a will. The Supreme Court of Wisconsin recognized the rule against perpetuities of Missouri and ignored the rule of Wisconsin and Michigan, where the land lay in Michigan and was to be sold and invested in lands in Missouri.

"It follows," says the Court, "that the validity of the proposed conversion of personal property into lands in Kansas City must be determined by the laws and courts of Missouri."

This case is cited by Mr. Minor<sup>34a</sup> in support of his contention that the interpretation of a devise is to be governed by the law or usage of the domicile. But the case proves nothing of the kind. Here the Court of the domicile refused to enforce its own law as to perpetuities, but left that question to be settled by the Court of the *situs*.

In *Ford v. Ford*,<sup>35</sup> *there was an equitable conversion*. The former decree<sup>35a</sup> was followed. Although the opinion contains a *dictum* that the *construction* of the domiciliary Court must control as to realty yet the basis of the decision is the doctrine of *equitable conversion*, *i. e.*, that there were really *no* lands in Michigan. The case then cites as authority for the *dictum* that "the meaning and intent of the testator having been settled by the domiciliary Court, the courts in foreign states and countries will be guided by such construction;" the cases of *Trotter v. Trotter*,<sup>36</sup> *Boyes v. Bedale*,<sup>37</sup>

<sup>34</sup> 70 Wis. 19, 1887.

<sup>34a</sup> a P. 341.

<sup>35</sup> 80 Mich. 42, 1890.

<sup>35a</sup> a 70 Wisconsin, 19.

<sup>36</sup> 4 Bligh (N. S.) 502 discussed *supra*.

<sup>37</sup> 4 Hem. & Miller, 708, 1863.



which related only to personalty, and only decided that "child" did not mean an illegitimate, but subsequently legitimated child, though such child could take under a will made in France.

In this connection note also that *Brown v. Brown*,<sup>38</sup> applies only to personalty and is erroneously cited by Minor,<sup>38a</sup> as relating to real estate.

The conclusion, therefore, is that in no case above cited by these text writers has a Court of the testator's domicil, when construing a will devising foreign real estate construed that will in violation of a rule of construction or law of the Courts of the *situs*.

*Crawford D. Hening.*

*(To be concluded in December number.)*

<sup>38</sup> 4 Wils & Shaw, 28, 1830.

<sup>38a</sup> a P. 342.